

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HOLLY REESE)	
Claimant)	
)	
VS.)	
)	
SMITH COUNTY)	
Respondent)	Docket No. 1,053,274
)	
AND)	
)	
KANSAS WORKERS RISK COOP FOR COUNTIES)	
Insurance Carrier)	

ORDER

Claimant requests review of the January 19, 2011 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleges she injured her right shoulder and upper back (and all body parts affected) in a series of traumas at work from March 2010 through July 28, 2010. The ALJ, however, denied claimant's request for workers compensation benefits after finding claimant failed to sustain her burden of proof. The ALJ held, in pertinent part:

Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with Respondent.

While Dr. Babb, in his IME report, opined that Claimant's right shoulder pain "**may have** been aggravated by her work activity" (emphasis added), he failed to indicate that symptomatic aggravation was "more probably than not" attributable to her work duties. The term "may have" expresses a possibility, not a probability.¹

¹ ALJ Order (Jan. 19, 2011).

Claimant, who is a dispatcher/jailer for Smith County, Kansas, challenges the ALJ's finding and contends that she injured her right shoulder and upper back while rolling back and forth behind the dispatch station to perform her job. She maintains that due to damaged floor tile, her chair would often times catch, which caused her to reach out with her right arm and grab the counter to prevent her chair from tipping over. Later, when the floor was carpeted, claimant continued to experience problems with her chair as it did not roll smoothly and she often reached out both to pull herself along and to prevent the chair from tipping. Claimant maintains that although Dr. Babb said her work 'may' have aggravated her shoulder, the only evidence in the record that explains claimant's injury is her repetitively grabbing the counter at work. She also argues that when circumstantial evidence and her testimony is considered she has met her burden of proof, which she asserts is merely to prove her claim is more probably true than not.

Finally, claimant argues there was just cause for delaying notice to respondent as she was out on leave for other health problems and had not actually determined the cause of her shoulder problems. In any event, claimant contends she provided respondent notice of her shoulder injury within 10 days of when Dr. Pulmeri related the problem to her work.

In short, claimant contends that when considering all the evidence the Board should reverse the preliminary hearing Order and grant her both medical treatment and temporary total disability benefits.

Respondent contends that this claim hinges on claimant's credibility and, therefore, the Board should defer to the ALJ, who observed claimant testify and found her testimony inconsistent and suspect. Respondent emphasizes that the ALJ appointed Dr. Babb as a neutral physician for the specific purpose of providing an opinion on the cause of claimant's right shoulder problems and the doctor could not relate claimant's injury to her work within a reasonable degree of medical certainty. The doctor could only say that claimant's shoulder 'may have been' aggravated by work. Accordingly, respondent argues that Dr. Babb cannot render an opinion within the degree of proof necessary to establish compensability of this claim.

In summary, the Board should defer to the ALJ's assessment of claimant's credibility and, after considering the entire record, deny claimant's request for benefits.

The issues before the Board on this appeal are:

1. Did claimant injure her right shoulder in an accident that arose out of and in the course of her employment with respondent?;
2. If so, did claimant provided respondent with timely notice of the accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant worked as a dispatcher for three years. In addition to dispatching, claimant also monitored inmates in the county jail and cooked their meals. Sometime in March 2010 claimant developed pain in her right shoulder that went from her collarbone into her right arm and back. Claimant cannot identify any single incident or accident that started her pain as she “just woke one day and it hurt.”²

On March 22, 2010, claimant sought medical treatment from Dr. Tom Plumeri. Dr. Plumeri believed claimant’s shoulder was inflamed, and advised claimant that shoulder injuries were difficult to diagnose, and prescribed anti-inflammatory medications. Claimant admits there is no mention in the doctor’s notes about her complaints being work-related.³ The doctor’s notes from March 22 indicate that claimant experienced shoulder pain laying on her left side and lifting items. He recorded that claimant had not sustained any trauma but that she had merely awoke with shoulder pain. In addition, those notes state that claimant had put off seeking treatment but that her symptoms were now interfering with her sleep.

Claimant continued to work for respondent but she attempted to avoid using her right arm. The medication helped control claimant’s right shoulder pain. But two weeks later, after she had used all her medication, claimant’s symptoms steadily worsened. On July 28, 2010, claimant telephoned Dr. Plumeri to ask about the MRI he had mentioned at their initial visit. Claimant underwent the MRI on August 2, 2010, and met with the doctor the next day. A portion of their conversation concerned the cause of claimant’s shoulder problems. Claimant testified, in part:

He asked if I had been in a car wreck recently. I said I had not been in one for -- not recently. He asked if I had fallen off of a horse. And I told him I had not even been on a horse for the last 20 years. He asked if I could think of, you know, if I did like rock climbing or if there was anything I could think of where it would have stressed my shoulder. The only thing that I could think of was from work, having to grab the counter to prevent myself from tipping over on my chair when it got caught on the floor.⁴

² P.H. Trans. at 10.

³ *Id.* at 25.

⁴ *Id.* at 13.

Claimant contends that was the first time when she became aware of the cause of her shoulder symptoms.⁵ According to claimant, after March 2010 grabbing the counter caused immediate pain but the pain would resolve.⁶

Claimant explained that while dispatching she would roll her chair several feet along a counter but floor tiles were missing, which caused her chair to catch and pitch. When the chair began tipping, claimant would grab the counter with her right arm to avoid falling to the floor. Claimant estimated that her chair pitched weekly.

In May 2010, respondent covered the floor with carpeting and a plastic mat. But that prevented claimant's chair from rolling and created additional situations where claimant had to grab the counter to keep her chair from tipping over. And that caused symptoms in her right shoulder and back. According to claimant, once the carpet was installed the weekly occurrences increased to several times at night. Moreover, she believes that at least three other dispatchers complained to the supervisor about the carpeting and plastic mat.

Claimant believes her co-workers and supervisor knew she was having right shoulder symptoms as she regularly complained about her shoulder at work and she would comment how her shoulder hurt when she lifted her right arm to push buttons.

Claimant last worked for respondent on July 28, 2010. The next day she was driving to work and experienced chest pains and shortness of breath. While off work for those health problems, claimant received a letter dated August 2, 2010, terminating her employment.

On approximately August 16, 2010, claimant left a letter for her supervisor in which she reported that Dr. Pulmeri believed her shoulder symptoms were due to the times she had grabbed the counter to keep from tipping over in her chair.

Respondent presented the testimony of claimant's supervisor, Amy Hanchett. Ms. Hanchett testified that she had experienced no problems with the chairs at the dispatch counter and that none of the other dispatchers had complained about the chairs or the tile floor.⁷ Moreover, Ms. Hanchett had not experienced any problem with the chairs on the carpeting or plastic mats and never observed claimant having any difficulty.⁸ In addition,

⁵ *Id.* at 18.

⁶ *Id.* at 34.

⁷ *Id.* at 45.

⁸ *Id.* at 47.

Ms. Hanchett does not recall claimant complaining about shoulder, neck or back pain at work.⁹

Following the preliminary hearing, the ALJ wrote to Dr. John Babb and requested the doctor to examine claimant and provide his “opinions on diagnosis and recommendations for treatment.”¹⁰ The letter to the doctor included a Preliminary Hearing Order entered November 22, 2010, in which the ALJ also requested the doctor to provide an opinion, among other things, as to whether claimant’s complaints were causally related to the work she performed for respondent.

Dr. Babb examined claimant in December 2010 and diagnosed right shoulder pain with rotator cuff tendonitis. The doctor then notified the ALJ and parties of the results of his examination. In addressing the cause of claimant’s shoulder symptoms, the doctor wrote, in part:

Causation: with regards to causation, there is no documentation or report of one specific injury to her right shoulder. It is within a reasonable degree of medical probability that her [claimant’s] current complaints of right shoulder pain were not due to a specific injury to her right shoulder but her right shoulder pain may have been aggravated by her work activity.¹¹

The ALJ denied claimant’s request for workers compensation benefits and emphasized in the January 19, 2011, Order that Dr. Babb’s use of the terms ‘may have’ indicated there was a possibility, rather than a probability, that claimant’s right shoulder symptoms were aggravated by the work she performed for respondent.

The undersigned finds that the January 19, 2011, Order should be affirmed. The undersigned does not believe the compensability of this claim turns upon the terms used in Dr. Babb’s letter. This Board Member finds that Dr. Babb’s opinions tend to establish that grabbing the counter at work as claimant alleged was medically competent in producing the injury or condition that the doctor found in claimant’s shoulder. Nonetheless, the question whether claimant injured her shoulder at work hinges upon, in this Board Member’s opinion, whether claimant actually grabbed the counter at work to the extent she testified to prevent her chair from tipping over. Claimant’s supervisor specifically refuted that portion of claimant’s testimony and, moreover, the supervisor testified that neither claimant nor her co-workers complained about the chairs, floor, or carpeting. And those co-workers have not testified.

⁹ *Id.* at 50.

¹⁰ Judges Moore’s November 22, 2010, letter to Dr. Babb, found in the Division’s administrative file.

¹¹ Dr. Babb’s December 17, 2010 IME report at 5.

In summary, at this juncture the undersigned finds that claimant has failed to prove it is more probably true than not that she injured her shoulder at work. Accordingly, the issue of timely notice is rendered moot.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹² Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 19, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2011.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

¹² K.S.A. 44-534a.